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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0062/12/13

In the Matter of Apartment 2 Splashpoint, 10 Hilton Drive, Rhyl LL18 3BF

In the matter of an Application under Section 27A of the Landlord and Tenant Act 1985

TRIBUNAL	**Timothy Walsh (Chairman)** **Colin Williams (Surveyor)**
APPLICANT	**Ground Rents (Regis) Ltd**
RESPONDENT	**Timothy Wayne Hughes**

REASONS FOR THE DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

The Decision in Summary

1. For the reasons given below we determine as follows:

1.1 The pleaded claim for "service charges" from 1 January 2013 to 30 June 2013 in the sum of £469.36 is in fact for the balance due on the Respondent's account on or around 18 April 2013. That account had included administration charges and service charges. However, the liability that placed the account ostensibly into arrears of 469.36 was the 1 January 2013 service charge liability of £594.53.

1.2 The interim service charge for 1 January 2013 to 30 June 2013 of £594.53 was based on an annual budget for the period from 1 July 2012 to 30 June 2013 of £22,592.00 and so an annual interim service charge of £1,189.05. We determine that a reasonable budget was £18,130.78. The interim service charge is accordingly reduced to £954.25 for the full financial year and £477.13 for six months. The claim for the "service charge" balance is therefore reduced by £234.80 from £469.36 to £234.56. It is obviously necessary to determine the service charge liability by reference to the whole year and not just the six months of the pleaded claim.

1.3 We accordingly determine that the sum of £234.56 is recoverable as "service charges". That determination is without prejudice to the Respondent's entitlement

to challenge administration charges dated 14 December 2011 and 2 March 2012 which form part of the account balance.

1.4 We determine that the actual expenditure for the year 2012/2013 was reasonably incurred and to a reasonable standard and we reject all three of the Respondent's challenges to actual expenditure accordingly. As the Respondent received a credit for £768.47 against the overpaid interim service charge on 5 September 2013 the reduction in the interim service charge does not therefore affect the balance outstanding on the Respondent's account.

1.5 The amount of the pleaded administration charges of £144.00 and £198.00 was unreasonable. We determine that reasonable administration charges for those expenses were £40 and £100 plus VAT and so £168 in total.

1.6 We determine that a claim of four and a half hours to issue a basic claim at grade B fee earner rates is unreasonable. A reasonable cost for such work is three hours at £200 and so £600 plus VAT which would be appropriate, if incurred, for the work up to receipt of the Defence. This would reduce the claimed legal costs from £1,000 to £640. We have not otherwise considered or made any determination as to the reasonableness of the legal costs incurred for the purposes of section 19 of the 1985 Act.

1.7 Under section 20C of the Landlord and Tenant Act 1985 we determine that 20% of the costs incurred by the landlord in connection with the proceedings should not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

Background

The parties and the property

2. The Applicant is Ground Rents (Regis) Limited. It is the freehold owner of land and buildings which form an estate known as "Splash Point" ("the Estate") which is located in Hilton Drive in Rhyl. That freehold reversion is registered with HM Land Registry under title number CYM135135. The Estate is divided into 19 flats or apartments all of which are held under 999 year terms commencing on 30 June 2006; they were evidently granted by the Applicant's predecessor in title, NWPS Developments Limited. The Applicant became the registered freehold owner of the reversion on 18 June 2010. It brings this application as the landlord of "Apartment 2"which is one of the 19 leasehold properties on the Estate.

3. The Respondent is Mr. Timothy Hughes. He is the tenant and registered leasehold owner of Apartment 2 under title number CYM330223. He purchased that flat on 7 December 2006 and holds Apartment 2 under a lease ("the Lease") of that date.

4. At 11.00 a.m. on 8 April 2014 the Tribunal conducted a site inspection. We were attended by the Applicant's counsel and representatives but not by the Respondent or his solicitor. We were unable to see the interior of Apartment 2. We were given a tour of the exterior and internal common parts, with the former comprising a short drive accessed from Marine Drive to the west which leads down to a walled but open car park. There are inoperational electric gates at the east end of the drive. There is a grassed area located to the north of the flats which was reasonably well tended although not, we were told, by the Applicant. There is also a limited amount of parking to the south of the flats accessible from Hilton Drive. The flats themselves are located at ground, first and second floor levels with two internal staircases serving the flats. The plan to the Lease at page 97 of the hearing bundle provides a general guide but was based on an architect's plan for the development and so is not entirely accurate.

5. This matter originally came on for hearing on 8 April 2014 when the Applicant was represented by Mr. Richard Adkinson of Counsel. The Respondent was not present in person but was represented by Mr. John Owens of John Owens Solicitors. When the matter came back for hearing on a second day on 16 July 2014 Mr. Owens continued to act for the Respondent but the Applicant was represented by Ms. Rowena Meager of Counsel.

6. The initial hearing was somewhat unsatisfactory. There was a short delay in commencing the hearing because it had not been communicated to the tribunal members that the Respondent would not be attending the site visit. When the hearing did commence some time was spent in narrowing the issues and with the Applicant opening the case and, ultimately, applying for an adjournment. Insofar as it is material, we shall explain the significance of that below. No witness evidence was called on 8 April 2014 and it was no doubt on that basis that Mr. Adkinson felt able to hand the reins over to Ms. Meager. On 16 July 2014 Ms. Meager also supplied additional written skeleton submissions to which the Tribunal has had regard.

The County Court Claim

7. This matter was transferred to the Leasehold Valuation Tribunal by order of District Judge Thomas, sitting in Rhyl County Court, dated 12 December 2013. By paragraph 2 of that order it was directed that the question of the reasonableness of the service charges under the Lease be transferred to the Leasehold Valuation Tribunal.

8. The Applicant had issued those County Court proceedings on 3 July 2013 and sought a total of £1,818.56 plus interest. The heads of claim were:

   (1) Service Charges for the period 1 January 2013 to 30 June 2013 in the sum of £469.36.
   (2) Administration Charges for 14 February 2013 and 14 March 2013 in the sums of £144.00 and £198.00 respectively (£342.00 in total).
   (3) "Recharged Expenditure" totalling £7.20.
   (4) Legal costs of £1,000. The pleaded claim is stated to be broken down as follows: *"£900 costs plus VAT of £180.00 less fixed costs of £80"*.

9. The total claim in the County Court was accordingly £1,818.56.

The Defence

10. Messrs John Owens Solicitors filed a Defence to the claim on behalf of the Respondent. The thrust of that Defence is as follows:

    10.1 First, reliance is placed on paragraph 7-2.6 of Schedule 7 of the Lease which requires the interim service charge payable under the Lease to be reasonable having regard to the likely amount of the Service Charge.

    10.2 The Defence asserts that the total interim service charge for the Estate for the period 1 July 2010 to 30 June 2011 was £12,023.21 but the actual service charge expenditure was £6,475.98. For the corresponding 2011/2012 period, the total interim service charge is stated to have been £12,799 but the actual service charge expenditure was £6,676.00. For 2012/2013 the Defence states that an interim service charge budget of £22,592.14 was set by the Applicant. This, it is said, was unreasonable. It is asserted, at least implicitly, that the level of interim service

charge was so high that it exceeded the Applicant's contractual power under paragraph 7-2.6.

10.3 The balance of the Defence to the claim was as follows:

(i) At paragraph 7 the service charge debt of £469.36 is denied. From the pleading it was not clear that any issue was being taken with the underlying reasonableness of any actual service charge expenditure as distinct from the reasonableness of the level at which the interim service charge was fixed.

(ii) At paragraph 8 the Respondent denied any liability for the Administration Charges and also asserted that they were irrecoverable under the Lease and unreasonable.

(iii) At paragraph 9 the "Recharged Expenditure" claim of £7.20 was denied.

(iv) Finally, the claim for legal costs was challenged as irrecoverable under the terms of the Lease and unreasonable and excessive in amount.

11. In response to the Defence the Applicant filed a Reply which has also since been augmented by a Statement of Case dated 25 February 2013 and by the submissions made to this Tribunal. On the central issue of the discrepancy between the interim service charge demands and the quantum of the actual service charge expenditure, the Reply asserts that this has arisen because of a shortfall in the funds available because the lessees do not pay the service charge demands. It is asserted that as a result of a lack of funds the landlord is constrained to provide only a scaled back programme of works and services.

12. By letter dated 18 February 2014 the Respondent's solicitors confirmed that his submissions were contained in the Defence to the County Court Proceedings. Directions made by this Tribunal on 10 January 2014 had also asked that the Respondent indicate whether he wished to make an application under section 20C of the Landlord and Tenant Act 1985 ("the Act") and, if so, to include any representations in support of such an application by 3 February 2014. The letter of 18 February 2014 confirms that the Respondent does wish to make a section 20C application but no written representations were made either by 3 February 2014 or in the letter of 18 February 2014 (or otherwise).

13. On 17 February 2014 the Tribunal had extended the time for the Applicant to comply with certain directions in the order of 10 January 2014 and on 18 February 2014 it forwarded the

Respondent's letter of that date to the Applicant with a request that the Applicant now comply with the extended deadlines in the Tribunal's letter of 17 February 2014. In short, at that point all concerned knew, albeit belatedly, that the Respondent wished to make a section 20C application notwithstanding the omission of supporting representations.

14. At paragraph 11 of her written submissions for the Applicant Ms. Meager submitted that the Respondent should be debarred from making any section 20C application because no submission had been made in time and no written representations had been made at all. These were not points taken by Mr. Adkinson when setting out the Applicant's case at the initial hearing.

This Tribunal's Jurisdiction

15. The Transfer of proceedings to the Leasehold Valuation Tribunal is made pursuant to paragraph 3 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002 which provides that:

"3(1) Where in any proceedings before a court there falls for determination a question falling within the jurisdiction of a leasehold valuation tribunal, the court –
(a) may by order transfer to a leasehold valuation tribunal so much of the proceedings as relate to the determination of that question, and
(b) may then dispose of all or any remaining proceedings, or adjourn the disposal of all or any proceedings pending the determination of that question by the leasehold valuation tribunal, as it thinks fit..."

16. Here the order of the County Court dated 12 December 2013 transferred only the question of the reasonableness of the service charges. Any separate question relating to administration charges was not transferred although it seems probable that that was merely an oversight. We sought the parties' views on this issue and, by agreement, proceeded on the basis that we should consider, and at least express a view upon, all of the heads of claim in the County Court proceedings.

17. Indeed of the £818.56 sought (excluding legal costs), the pleaded claim for a sum of £469.36 as "service charges" for 1 January 2013 to 30 June 2013 masks a more complicated background. At page 152 of the bundle there is a running total for the Respondent's account which shows that the balance as at 15 April 2013 was indeed £818.56 and once the pleaded administration charges and recharged expenditure are stripped out that balance reduces to £469.36. However, that figure never actually appears in the account because of the various credits that are applied to it. The sum of £469.36 is simply the running total or

balance of the account but the account includes two previous administration charges (on 14 December 2011 and 2 March 2012). The interim service charge for the six months from 1 January 2013 to 30 June 2013 was in fact £594.53 not £469.36 and what is being sought is the balance due on the account when the claim was formulated after 15 April 2013. That stated, it is the case that it was the addition of the liability for the 1 January 2013 interim service charge that put the account into arrears in the sum of £469.36.

18. Ms. Meager accepted that the foregoing analysis was accurate at the final hearing.

The Lease

19. By Clause 3 of the Lease the Respondent, as lessee, covenants with the Landlord and the Management Company to observe and perform the Lessee's Obligations to the Landlord contained in Part 1 of Schedule 5 to the Lease. The tenant's obligations under Schedule 5 include paragraphs 5-14, 5-15 and 5-18. Paragraph 5-14, insofar as relevant, provides as follows:

"5.14 Costs of applications, notices and recovery of arrears

The Lessee must pay to the Landlord the full amount of all costs, fees, charges, disbursements and expenses, including without prejudice to the generality of the above those payable to counsel, solicitors, surveyors and bailiffs, incurred by the Landlord in relation to or incidental to:
5-14.1 [...]
5-14.2 the contemplation, preparation and service of a notice under the Law of Property Act 1925 Section 146, or the contemplation or taking of proceedings under section 146 or 147 of that Act, even if forfeiture is avoided otherwise than by relief granted by the court;
5-14.3 the recovery or attempted recovery of arrears of rent or other sums due under this Lease..."

20. Paragraph 5-15 provides for the recovery of interest on arrears of sums due under the Lease.

21. Paragraph 5-18 of Schedule 5 provides that the tenant must observe and perform his obligations contained in Schedule 7.

22. Schedule 7 is concerned with "The Service Charge and Services". "The Service Charge" is defined in Clause 1.1.22 of the Lease as "*the Service Charge Percentage of the Expenses of the Services and Insurance"*. The Service Charge Percentage is defined in Clause 1.1.23 as 5.263%. "*The Services"* are defined in Clause 1.1.24 as *"the services, facilities and amenities specified in Schedule 7 paragraph 7-3 as added to, withheld or varied from time to time in*

accordance with the provisions of this Lease". Paragraph 7-3 is a comprehensive list of services which we accordingly do not set out verbatim here. It was accepted by Mr. Owens for the Respondent that no part of the Applicant's claim related to services that were not particularised in the Lease as part of the services under paragraphs 7-3.1 to 7-3.21.

23. The "Expenses of the Services and of Insurance" are defined in Clause 1.1.12. At clause 1.1.12.1 these include: *"the costs and expenditure - including all charges, commissions, premiums fees and interest - paid or incurred, or deemed in accordance with the provisions of Schedule 7 paragraph 7-2.3 to be paid or incurred, by the Landlord or the Management Company in respect of or incidental to all or any of the Services or otherwise required to be taken into account for the purpose of calculating the Service Charge...".*

24. Generally, schedule 7 is a detailed scheme relating to service charges. For the purposes of that scheme the financial year is defined in paragraph 7-1.1 as *"the period commencing on 1st July in any year and ending on 30th June in the same year or such other annual period as the Landlord in his discretion determines as being that for which his accounts, either generally or in respect of the Estate, are to be made up."*

25. More significant to the present dispute are the provisions at paragraphs 7-2.5 to 7-2.8 which concern payment of the service charge:

"7-2.5 Payment

For each financial year the Lessee must pay the Service Charge Percentage of the Services in two equal half yearly instalments on the 30th June and 30th December in each year of The Term and the Insurance in full when it falls due.

7-2.6 Payment on Account

For each financial year the Lessee must pay to the Landlord on account of the Services on the 30th June and 30th December in each year of The Term such a sum as is reasonable having regard to the likely amount of the Service Charge. That sum must be paid in advance on the 30th June and 30th December in each year of the Term, the first instalment to be paid on the day immediately before the commencement of the financial year in question. During any financial year the Landlord may revise the contribution on account of the Service Charge for that financial year so as to take into account any actual or expected increase in expenditure.

7-2.7...

7-2.8 Final account and adjustments

As soon as reasonably practicable after the end of each financial year, the Landlord must furnish to the Lessee with an account of the Service Charge payable by him for that financial year, credit being given for payments made by the Lessee on account. Within 21 days of the furnishing of such an account, the Lessee must pay the Service Charge or any balance of it payable, to the Landlord. The Landlord must allow any amount overpaid by the Lessee to him against future payments of Service Charge whether on account or not. At the end of the financial year current at the end of the Term the Landlord must repay to the Lessee any outstanding overpayment of the Service Charge."

Service Charges

26. A "service charge" is defined in section 18 of the 1985 Act:

"18(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—
(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period."

27. Under section 19 of the Act a statutory safeguard is provided.

"19(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

28. It will be noted, in particular, that section 19(2) imposes a statutory limitation on the amount of any interim service charge payment requiring that it is "*no greater amount than is reasonable"*. Paragraph 7-2.6 of Schedule 7 of the Lease broadly mirrors the statute.

29. Section 20B of the 1985 Act imposes a statutory time limit on the recovery of service charges whilst section 21B of the 1985 Act provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of the tenant in relation to the service charges. These are contained in the Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (Wales) Regulations 2007 (SI 2007/3160 (W 271)).

The Adjournment and the Evidence

30. At the initial hearing we were presented with a 290 page bundle. That included an Applicant's Statement of Case which was in the form of a witness statement from a Ms. Pam Lynch of Countrywide Estate Management ("HLM" being a trading name), the Applicant's managing agent. Most significant amongst those exhibits were year-end accounts for 2011, 2012 and 2013 at pages 120 to 146, the "Debtor History" at 152 and a breakdown of actual expenditure for 2013 at page 154. Also included were supporting invoices for that expenditure. Mr. Owens expressly accepted that the expenditure in question had been incurred and took no issue with the invoices per se.

31. The principal difficulty with the accounts supplied was that it was impossible to divine from them how much service charge income had been received and there was nobody on hand from the Applicant or its agents who could adequately explain to their counsel or the tribunal what light, if any, the accounts shone on the landlord's assertion that it had not received service charges from the tenants (with the result that it had been forced into lower expenditure and a scaled back provision of services under the lease). Counsel applied for an adjournment with a view to filing evidence addressing this evidential lacuna and the Respondent did not oppose such an adjournment. In the event, we made use of the remaining time to allow counsel to complete his opening and in order to narrow or identify the issues. At the conclusion of the initial hearing the position was as follows:

    31.1 The reasonableness of the amount of the interim service charge remained in issue. There were two side issues. First, there remained the issue over whether the tenants' failure to pay was the cause of the disparity between actual and estimated expenditure. Secondly, the Applicant's counsel indicated that he would call evidence to establish that the 2013 budget had in fact been agreed with the tenants and/or their tenants' association.

31.2 Aside from the reasonableness of the budget underpinning the interim service charge demand, the reasonableness of the actual service charge (summarised at page 154 of the bundle) was put in issue by the Respondent in relation to: (a) electrical repairs of £3,168.96; (b) electricity to common parts of £752.78; (c) management fees of £2,998.21.

31.3 Mr. Owens expressly disavowed any challenge to the service charges based upon the demands or their form notwithstanding that only one demand for service charges appeared in the bundle at page 17.

31.4 It was common ground that the legal costs included in the claim were service charges and so fell within this Tribunal's costs jurisdiction under section 20C of the Act.

32. Additionally, the tribunal raised the question of whether the dispute over the interim service charge for the period to 30 June 2013 had been rendered largely academic. The claim was issued on 3 July 2013 and on 5 September 2013 a credit for the financial year ending on 30 June 2013 had been applied to the account in the sum of £768.47 (albeit that an interim service charge of £346.41 had fallen due on 1 July 2013). It was common ground between the parties that the dispute still required an adjudication and we have been content to proceed accordingly.

33. At the conclusion of the first hearing procedural directions were given allowing the parties to file additional evidence. The Respondent declined to do so and so the only documentation put before the tribunal on his behalf is the Defence filed in the County Court.

34. The Applicant filed a witness statement from a Mr. John Ryan of Countrywide Estate Management together with accompanying documentation which extended the hearing bundle to some 416 pages in length. Of particular note in that additional bundle was page 368 (another version of which had in fact been added to the bundle by agreement at page 290A at the previous hearing). That is the "Estimate of Annual Service Charge Expenditure for the Year Ending 31/06/2013" and so relates to the only year actually challenged by the Respondent. It is that budget which produced the estimated annual contribution per property of £1,189.05 and the two interim demands for the year ending 30 June 2013 of £594.53 in respect of which objection is made.

35. The other document that merits being singled out is what was termed the "Issues Register" which appears at page 369 of the bundle and was a "travelling" document used when attempts were made to fix the 2013 budget.

36. We heard evidence from Mr. Ryan who was skilfully cross-examined by Mr. Owens notwithstanding the constraints upon him by reason of the absence of his client or any filed evidence for the Respondent.

37. On the vexed question of the service charge receipts for the Estate the evidence remained, regrettably, somewhat opaque at best.

Evidence on the Budget negotiations: Discussion

38. In Mr. Ryan's written evidence there is reference to a Splashpoint Estate Residents' Association. At the hearing it was established that a Tenants' Association had been formed and a constitution was prepared. Mr. Owens' firm was apparently instrumental in that process although regrettably no copy of the constitution was available at the hearing. The position appears to have been reached where the constitution was signed by the tenants (and we assume the present Respondent) and presented to the Applicant. It is not the Applicant's practice, however, to recognise tenants' associations formally and it declined to do so on this occasion. A Mr. Mark Ellis was the Association's chairman. No application was made for recognition of the Association but despite refusing to recognise the Association the Applicant's managing agent, HLM, was prepared to liaise with Mr. Ellis over the service charges and budgets. This was common ground at the hearing.

39. On 5 May 2011 a Mr. Peter Williams of HLM wrote to Mr. Ellis in his capacity as chairman of the Tenant's Association and suggested a meeting to discuss the problem of service charge arrears. This appears from page 311 and was one of the earliest of many exchanges about arrears that appeared in the bundle.

40. It is the Applicant's unchallenged case that there was an historic problem with service charge debts pre-dating its involvement. In the unaudited service charge accounts for the year-end 30 June 2011 a figure is included for "service charge debtors" of £22,595.41. That necessarily included historic arrears since the budget for that year was £12,023.21. In fact, though, it emerged in evidence that HLM never received accounts from the previous agent.

This was confirmed in an internal email from Mr. Williams dated 28 June 2011 (at page 311) and it appears that "aged arrears" for the period before 2010/2011 were written off on 4 July 2011 (as to which see page 310 of the bundle). Although there was some ambiguity in the evidence of Mr. Ryan, the "aged arrears" written off appear to have been £8,804.00 (which was the figure contained in the table at page 311 of the bundle).

41. The service charge accounts for year-end June 2011 had anticipated expenditure of £12,023.21. Actual expenditure was only £6,475.98. Mr. Ryan gave evidence that receipts for that year were only £2,090.51. For June 2012 budgeted expenditure was £12,799. Actual expenditure was £6,123.00. Mr. Ryan told us that receipts in that year totalled £13,385.33. For June 2013 the budgeted expenditure was £22,592.14 and receipts were, he told us, £18,122.00. The actual expenditure recorded in the breakdown at page 154 was £7,985.17. On these figures, HLM received £33,597.84 over three years although Mr. Ryan stated that the receipts could relate to prior years (e.g. a receipt in 2012 might relate to a liability in 2011) and the credits would have included refunds from utility companies and administration charges and so not just service charge credits. Accordingly, although the expenditure on services over that three year period was around £22,584.14 it was Mr. Ryan's evidence that no surplus was generated and that annual expenditure of £7,500 odd a year was not sufficient for the Estate.

42. It is clear from the email exchanges exhibited to Mr. Ryan's statement that a legacy of historic management was that a degree of mistrust remained over the provision and cost of services. Moreover, by January 2012 Mr. Williams was writing to Mr. Ellis on behalf of HLM and pointing out that 15 of the 19 Splashpoint accounts were in arrears in relation to their service charges.

43. Efforts to agree the material 2013 budget appear to have commenced in earnest in July 2013 and the first version of the "Issues Register" was drafted by Mr. Ellis and sent to the Applicant on 6 July 2012. On 10 July 2012 Mr. Ryan emailed Mr. Ellis as he was anxious to attend a meeting of the Tenants' Association to "clear the air" and to "set a budget we all agree on".

44. An email from Mr. Ellis following an AGM of the Tenant's Association on 13 August 2012 indicated that issues remained over the budget. The tenants wished to defer certain works

(it is unclear which from the emails in the bundle), agreed to others and queried the quotations for some.

45. Ms. Pam Lynch corresponded by email with Mr. Ellis but no budget could be finalised by the start of September 2012. This prompted her to email Mr. Ellis on 4 September 2012 warning that the budget was overdue and something would have to be sent out (i.e. demands) although she was happy to discuss it together with points from the Issues Register.

46. The next available exchange of emails between HLM and Mr. Ellis is dated 5 October 2012. Insofar as one can discern from those emails (which appear part of an incomplete chain) there was now broad agreement to the whole budget, as far as Mr. Ellis was concerned, with the exception of the budget for works to the electrical gate to the car park. Further emails followed on 9 November 2012 and the thrust of those is again that the Issues Register and budget were now practically agreed to all intents and purposes save that HLM's Ms. Lynch included a "ball park figure" for the electrical gate "*based on the numerous quotes I have received*".

47. The bundle did not contain the various "travelling" versions of the Issues Register and that at page 369 of the bundle was dated 8 October 2012. We were told that some of the figures had been inserted based on HLM's estimate rather than third party quotes. We were not furnished with copies of the quotations.

48. What is clear from the bundle and the foregoing background is that attempts were made by the Applicant to reach some form of accord with the tenants in relation to the budget although we do not accept the Applicant's submission that it is irrelevant that they did not recognise the Tenants' Association and it would also appear that no final agreement was reached before the demand for the interim service charge was belatedly made in the Autumn of 2012. Nonetheless, it is incontrovertibly the case that the Applicant did delay issuing the demand for an interim service charge whilst it engaged in a protracted attempt to reach agreement on a budget that would not be controversial. Given the history of the site this was plain commonsense and Mr. Owens did not seriously cast doubt on the bona fides of HLM in relation to their attempts to fix upon a budget with Mr. Ellis.

Conclusions on Service Charges

The Interim Service Charge for 2012/2013 and Actual Expenditure

49. Before turning to the question of the service charges (both interim and actual) it is necessary to address a point of principle. Both parties made submissions on the evidence and on the evidential burden of proof in particular. There were deficiencies in the evidence of the Applicant and, of course, the Respondent produced nothing more than his Defence. Both parties' advocates made submissions asserting that the burden of proof rested with the other. In most cases argument over the burden of proof is somewhat sterile. As Sedley L.J. stated in *Daejan Investments Ltd. v. Benson* [2011] EWCA Civ 38 [86]:

"It is common ground for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law. In nine cases out of ten this is sufficient to resolve the contest. It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out, the tribunals ought in my view not to be astute to do so: the burden of proof is a last, not a first, resort."

50. By way of general observation on the evidence, the first point is that Paragraph 7-2.6 of the Lease and section 19 of the Act respectively require that the interim service charge is "reasonable" having regard to the likely amount of the service charge. In our view, the fact that a budget is the product of prolonged negotiation with the tenants, and apparently some agreement, is material notwithstanding that the Tenant's Association is not formally recognised. It is also relevant that the Applicant's assertion that the budget was largely agreed has not been contradicted by the Respondent who had the opportunity to file evidence on this issue but declined to do so.

51. Secondly, contrary to the assertion in the Defence, we do not consider that it is possible to infer that the 2012/2013 interim service charge was unreasonable by reference to the discrepancy between the historic budgeted expenditure and the actual expenditure nor by a comparison of the budget with what was in fact spent for the 2012/2013 financial year. We accept Mr. Ryan's broadly unchallenged evidence that there is a history of non-payment of service charges at the Splashpoint Estate. Whilst the evidence of service charge receipts was not entirely satisfactory, the evidence from Mr. Ryan and that contained in the emails he

produced established that the explanation for the discrepancy was probably the irregular, uncertain and incomplete receipt of service charges year after year. On the evidence, we therefore conclude that the contrast between the budgeted and actual expenditure does not show consistent poor budgeting in the way asserted by the Defence.

52. Even this year, as at 24 April 2014, service charge debtors were put at £10,756.57 according to the snapshot exhibited at JR8 of Mr. Ryan's statement. This was notwithstanding that service charges of over £8,000 have already been written off and credits applied for reduced expenditure as against budgeted expenditure.

53. Turning to the budget of £22,592.00, for ease of reference we set out the budget as it appears at page 368 of the bundle. That is the material 2013 budget.

Services and Maintenance	**Estimated Service charge 2012/13**
Electricity common areas	£1,600.00
Grounds maintenance	£2,500.00
Internal cleaning	£950.00
Fire and smoke equipment replacement and testing	£500.00
General Repairs and Maintenance	
Electrical repairs	£550.00
General repairs	£750.00
Specific Repairs	
Car park lighting repairs	£2,100.00
Repair alleyway gate	£420.00
Bin store repairs	£456.00
Intercom repairs	£396.00
Door hinge replacements	£158.00
Motion sensor lighting (interior)	£1,500.00
Satellite repairs	£468.00
Gate Repairs and Maintenance	
Gate maintenance (annual service)	£264.00
Gate repairs	£250.00

Gate health and safety upgrade	£4,500.00
Insurances	
Buildings insurance excess	£250.00
Home owners emergency assistance	£228.00
Sundries	
Postage and copying etc.	£60.00
Reserves and Cyclical Repairs	
Insurance revaluation accumulation	£342.00
General reserve accumulation	£500.00
Professional Fees	
Health and safety risk management	£432.00
Management fees	£2,998.00
Accountancy fees	£420.00
Total Annual Expenditure:	**£22,592.00**

54. The Respondent did not challenge each and every head of the budget but that document was only supplied during the course of the hearing and since the Defence does put the interim service charge in issue as unreasonable generally we must necessarily consider the budget, doing the best we can on the limited evidence available to us. We find as follows.

54.1 A sum of £1,600 was budgeted for electricity for the common areas. The actual expenditure on electricity for the common parts was £752.78 which the Respondent also challenged. In our view the budget was unreasonable but the actual expenditure was not.

Previous electricity bills had, it is common ground, been based on estimates with the result that when the meters were read there was a substantial credit owed by E-on to the tenants. Mr. Ryan's evidence was that HLM did not have a full set of bills for the purpose of budgeting as they were not being sent directly to them but there was no satisfactory explanation as to why HLM had not arranged for meter readings when fixing such a contentious budget. Had it done so the budget would no doubt have been more in step with the actual expense that followed.

Conversely, the Respondent's assertion that the actual expenditure on electricity was unreasonable in amount is ill-founded. Mr. Ryan's evidence was that the electricity supplier was selected after HLM approached a brokerage called Hallmark to find it the most competitive price and that E-on was duly recommended. His evidence was that no fee was paid to Hallmark for this service and the Respondent led no evidence that there were materially cheaper rates available from an alternative supplier. The only conclusion available to us on this evidence is that the actual cost of electricity supplied to the common parts was reasonable.

We determine that a reasonable budget was, accordingly, £752.78.

54.2 The budget included £2,500 for grounds maintenance of the communal area. This was the figure included in the Issues Register and was marked as "essential". It equates to a fortnightly cost of less than £100. Having regard to the extent and nature of the communal areas this was not unreasonable in our view and it does not appear to have been regarded as unreasonable when the budget was negotiated.

54.3 Internal cleaning: £950.00. This budgeted sum is equivalent to £2.60 per day. There are two communal landings and staircases and whilst certain of the flats were accessible directly from external common parts the amount of foot traffic utilising the staircases means that the cost of employing cleaning services at this rate is clearly reasonable.

54.4 Fire and smoke equipment replacement and testing: £500. Provision for this sum appeared in the Issues Register in the VAT inclusive sum of £600 and was based on one quotation and ranked as an essential expenditure. The work was stated to include checking that all communal smoke alarms were working and replacing batteries as necessary. In the event, Shires Fire and Safety attended on 15 August 2012 and 26 March 2012 and raised two invoices for £114 each including VAT for the service of fire alarms and emergency lighting. We were not supplied with the original £600 quotation and, on balance, we consider that the best guide to the likely service charge is what it actually cost. A budgeted figure of £228 would accordingly have been more appropriate.

54.5 The budget for 2013 included £550 for "electrical repairs" and £750 for "general repairs". There were also seven items under the heading "specific repairs" totalling £5,498 which included £2,100 for car park lighting repairs. There were three items under the heading "gate repairs and maintenance" totalling £5,014.

It is not straightforward comparing the costing in the Issues Register (at page 369 of our bundle) with the budget (at page 368) and the actual expenditure (summarised at 154). There is no neat overlap between each.

Actual expenditure on electrical repairs was £3,168.96. This is challenged by the Respondent. The sum for actual expenditure is the total of three invoices. There is an invoice for £450 from Barlows (UK) Ltd (at page 197 of the bundle) which was for electrical installation reports. Those reports were added to our bundle at page 373 onwards and Mr. Ryan's unchallenged evidence at paragraph 31 of his statement was that those reports were obtained in accordance with NICEIC recommendations. On the basis of that evidence, that was a reasonable expense reasonably incurred.

The second invoice in the bundle appeared at page 198 for £476.16 from Bayline Security Systems. Mr. Ryan stated that this work related to repairs listed on the Issues Register as "general maintenance issues". No challenge was in fact made to the necessity for the works in the Bayline invoice which evidently involved three attendances by an engineer and the supply of a bulb, starter switch and new unit.

It appears that this invoice (for £396.80 plus VAT) may correspond with the provision in the budget for £396 for intercom repairs which was also described in Issues Register as an urgent priority. There was no corresponding quotation in the Issues Register but no suggestion was made in submissions that the budgeted figure was not appropriate. Since the Bayline invoice at page 198 refers to "*[attendance] to Access System"* it seems likely that at least part of that invoice was concerned with that work.

The only conclusion that can be drawn from this available, but limited, evidence is that this was a reasonable expense and the estimate of £396 was also reasonable.

The third invoice (at page 199 of the bundle) was another Barlows (UK) Ltd. invoice. It totals £2,242.80. The particulars in the quotation refer to the replacement of "2 column lights & 1 bollard" as well as "relamp 4 bollard lights in gardens as quote", "relamp 4 remaining bollards..." and the replacement of chokes and ignitors. The original quote was not in the bundle but it appears from the invoice that work extended beyond the original quote and this was confirmed by Mr. Ryan.

The work covered by this invoice evidently relates to the work in the Issues Register described as "repair front (Marine Drive) car park lighting" and "check/replace bulbs in all rear (Hilton Drive) car park bollards". The VAT inclusive total of those sums in that document was £2,270. The main head of expense within that was £1,584 and although the register states that no quotations had been obtained there is reference to a 2010 quotation having been obtained from Kirrage Electrical in 2010. This work was regarded as essential in the Issues Register and from the available evidence it would appear that the necessity and probable expense of such work was not seriously in dispute, at least so far as Mr. Ellis was concerned as chair of the Tenant's Association.

The provision in the budget at page 368 for car park lighting repairs was £2,100.

The evidence in relation to the obtaining of quotations was not satisfactory and Mr. Owens made the point in submissions and cross-examination that Barlows are based in Malpas in Cheshire so that it might be thought surprising that a contractor closer to the Rhyl area could not be found with a commensurate reduction in the cost. Mr. Ryan indicated that he thought it probable that Barlows had supplied the lowest quotation.

There are obvious limitations in the evidence before us but on balance we conclude both that the actual expenditure on electrical repairs was reasonably incurred and that the budget for the interim service charge of £550 for electrical repairs and £2,100 for car park lighting repairs was also reasonable. We reach this conclusion for the following reasons:

(i) On the face of it, the invoices for the works in question appear reasonable for the work detailed therein. Whilst we have not seen alternative quotations from the Applicant nor has the Respondent led any evidence that the work was over-priced.

(ii) There is no obvious reason why the Applicant would have selected a contractor that was materially more expensive than absolutely necessary. On the contrary, having regard to the history of disputes over service charges on the Estate it is more probable that the landlord would be astute to ensure that the contractor's costs were reasonable. As we have already stated, there is no evidence that they were not.

(iii) The actual cost of the works is in step with the estimate or budget and is consistent with the Issues Register which contained similar estimates of likely costs and was not (so far as the emails reveal) the subject of serious dispute by Mr. Ellis during the course of negotiations on behalf of the tenants of the Estate.

We would add that there was no challenge to the standard of the works.

The provision for £750 as an estimate of the likely cost for "general repairs" was expressly "to cover any minor repairs to the property that might be required during this service charge year" whilst £550 in the Issues Register was likewise "to cover any minor electrical items such lighting, intercoms etc....". In short, each was a provision for maintenance or repairs that may arise on an ad hoc basis. Having regard to the accrued list of essential or urgent repairs identified by Mr. Ellis in his Issues Register this was, on the available evidence, a reasonable estimate of the likely amount of the actual cost.

54.6 The balance of the "specific repairs" in the budget at page 368 were as follows:

(a) A provision for "Repair Alleyway Gate" was made of £420. This was a security gate and the work was described by Mr. Ellis as an urgent priority. Unless the Bayline invoice at page 198 related to this (and it appears it did not) there was no invoice for this work in the bundle and no quotation. However, the Applicant's witness evidence was to the effect that, in the absence of a

quotation, they had included sums based on their assessment of the likely cost based on the work needed and their own experience. This was one of a number items upon which neither party led any evidence either in relation to the character of the work needed or the pricing of that work. What is clear, however, is that it was common ground the alleyway gate was a security gate that was in disrepair and that it was intended to add a self-closing mechanism to it. On balance the budgeted cost seems consistent with that work and therefore reasonable.

(b) A provision for "bin store repairs" totalled £456.00. This was described as an essential priority in the Issues Register which relates that two quotations had been obtained. One was for £1,632 and the other for £456. It appears that the entirety of that work was not undertaken although there is an unchallenged invoice for removal of part of a wall from Primary Property Care in the sum of £68.22 (at page 261) which may relate to part only of the intended work. Although we were not supplied with copies of both quotations we accept Mr. Ryan's evidence that two quotations were obtained and it is self-evident that the cheapest was used to set the budget. Mr. Ellis did not challenge the necessity or proposed cost of the work which appears to have been an agreed element of the Issues Register and we were provided with no alternative quotations by the Respondent. On the evidence we therefore conclude that the budgeted amount was reasonable as having been in line with the lowest quote obtained for essential work.

(c) The Issues Register identifies that it was necessary to check all communal doors and that their hinges and closures were working properly and a quotation from Barlows (UK) Ltd. was obtained in the sum of £158.40 which was then transposed into the budget. Again, from the email exchanges in the bundle we infer that this was an uncontentious part of the budget so far as Mr. Ellis was concerned. Whilst we have not seen the Barlows quotation, on that evidence we do conclude that it was reasonable to set the budget accordingly in that amount.

(d) A sum of £1,500 was included in the budget for motion sensor lighting for the interior. This was again included in the Issues Register as agreed urgent work and there is reference to two VAT inclusive quotations of £1,800 and £1,500 which were not before us. Obviously the lower quotation provided the basis of

the budget. There is no evidence that the tenants (or Mr. Ellis on their behalf) took issue with these quotations and no submissions were addressed to us on this issue. Generally, a fee of £1,500 to install motion sensor lighting in an estate of this type in this area does not appear unreasonable. In our view the budgeted amount was accordingly reasonable.

(e) The final item of specific repair in the budget was a sum of £468 for satellite repairs and this was a VAT inclusive sum drawn directly from the Issues Register. Again we have not seen any corresponding quotation but the need for the work appears to have been regarded, as a matter of common ground, as urgent and this was seemingly an agreed part of the budget insofar as Mr. Ellis was concerned. The Respondent did not challenge the necessity for this work or its likely cost for the purpose of the budget and on the evidence it was reasonable to include provision for this. On the evidence, the only available or reasonable figure to budget for those works was £468.

54.7 In respect of the gate repairs, the budget included £264 for servicing. Two quotes had been obtained for £360 from Barlows and £264 from Chester Gates and the lower figure was adopted in the budget. We have not seen those quotations and the Respondent might reasonably query, again, the use of less local firms but that was not an unreasonable sum to include in the budget in our view having regard to the alternative quotation, the absence of any rival evidence from the Respondent and the comparatively low cost involved.

The provision in the budget of £4,750 in total for "gate health & safety upgrade" and "gate repairs" is more problematic for the Applicant. Ms. Lynch's email of 9 November 2012 explains that she included a ball park figure based on "numerous quotes" but they were not before us and the Issues Register refers to two VAT inclusive quotes for £5,836.80 and £2,076 from Barlows and Chester Gates respectively. This was a point of contention with the tenants but it was, and is, out of repair and accordingly we conclude that it was reasonable to include some provision for that work in the budget. The Respondent certainly accepted that the work could fall within the Services in principle. However, no satisfactory explanation was offered for Ms. Lynch's adoption of figures of £4,500 and £250 as against the Chester Gates quotation of £2,076.00 and we accordingly conclude that the sum of

£4,750 in total did not represent a reasonable assessment of the probable cost of the works based on the information then available. That does not, of course, mean that in due course the actual cost of this repair may not reasonably be higher but, on the material then available to the Applicant, a budget of £2,000 would have been reasonable.

54.8 Of the balance of the budget there are sundry comparatively small amounts. Provision was included for any insurance excess that might have to be paid in the event of an insurance claim in the sum of £250 but we regard that as unreasonable. There was provision in the Lease to revise the budget if required under Paragraph 7-2.6 and since the possibility of a claim resulting in an excess which would be recharged as service charge was entirely hypothetical we regard that as an expense that could have been addressed by the provisions in the Lease for varying the contribution on final accounts and adjustments if need arose. There was provision for £60 for postage and copying which was reasonable as it amounted to £3.16 per flat. No evidence at all was provided in relation to the "insurance revaluation accumulation" sum of £342 and so the Applicant has not discharged the burden of establishing that it was reasonable to include that in the budget. We reduce that to nil accordingly. Having regard to the totality of the budget, a general reserve of £500 or £26.31 per flat was a reasonable and proportionate way of legislating for probable contingencies over the financial year. A sum of £228 was included for "Homeowners Emergency Assistance" and was transposed from the Issues Register which stated that "...this covers any emergencies out of hours". It appears to have been a cost to provide cover for the provision of "the Services" in an emergency by third parties and so would have been covered by paragraph 7-3.14 of Schedule 7 to the Lease. It appears on the breakdown of actual expenditure at page 154 of the bundle and was not one of the heads of expenditure listed therein with which Mr. Owens for the Respondent took issue. As a result we conclude that that was a reasonable sum to include within the budget.

54.9 The final heading in the budget relates to "Professional Fees". These were accountancy fees of £420. The actual expenditure was £456, it is not challenged by the Respondent and was, in our view, reasonable in amount.

Mr. Ryan's evidence explains (at paragraph 40) that the HLM property manager will conduct quarterly site visits and produce reports. We presume that the provision for a "Health & safety Assessment" of £432 was for such reports. Such work is certainly caught by paragraph 7-3.11 of the Lease which singles out inspections as part of the Services and whilst the reports are rudimentary in the extreme that is reflected in a fee of, in effect, £108 per inspection which is, on balance, reasonable in amount for this development.

The chief area of dispute under this heading was the Respondent's contention that the management fee of £2,998 was excessive. The budgeted amount was the same as the actual expenditure which resulted from a monthly fee payable to the landlord's agent of £249.83 (or £13.15 per flat per month).

Mr. Owens, for the Respondent, made the point that far more limited services were provided than should have been and that the Estate should have cost commensurately less to manage. The Applicant's response was that, on the contrary, the problems with funding the Services made the Estate more difficult to manage (and more time consuming) since the Applicant's agent had to manage limited resources and prioritise essential services. It is incontrovertibly the case, having regard to the evidence in the email exchanges in the bundle in particular, that this has been a difficult estate for HLM to manage and that they inherited a legacy of mistrust and something of an apparent culture of non-payment so far as service charges were concerned. It was also Mr. Ryan's evidence that the fees charged were consistent with the fees HLM would charge for similarly sized estates.

We were provided with no documentary evidence from either party as to the rates that other agents might charge. Indeed, the Respondent provided no evidence at all to contradict the Applicant's assertion that the fees were reasonable.

It is our view, on the available evidence, that the management fees were not too high and were reasonable in amount in all the circumstances and in view of the size, character and history of this site and the nature of the problems with it. They were certainly broadly consistent with the level of management fees that this Tribunal

would expect to see and absent evidence from the Respondent to contradict Mr. Ryan's evidence we are constrained to reach the conclusion that we have.

55. The budget is necessarily varied as follows.

Services and Maintenance	**Estimated Service charge 2012/13**	**Revised Budget**
Electricity common areas	£1,600.00	£752.78
Grounds maintenance	£2,500.00	£2,500.00
Internal cleaning	£950.00	£950.00
Fire and smoke equipment replacement and testing	£500.00	£228.00
General Repairs and Maintenance		
Electrical repairs	£550.00	£550.00
General repairs	£750.00	£750.00
Specific Repairs		
Car park lighting repairs	£2,100.00	£2,100.00
Repair alleyway gate	£420.00	£420.00
Bin store repairs	£456.00	£456.00
Intercom repairs	£396.00	£396.00
Door hinge replacements	£158.00	£158.00
Motion sensor lighting (interior)	£1,500.00	£1,500.00
Satellite repairs	£468.00	£468.00
Gate Repairs and Maintenance		
Gate maintenance (annual service)	£264.00	£264.00
Gate repairs	£250.00	£2,000
Gate health and safety upgrade	£4,500.00	
Insurances		
Buildings insurance excess	£250.00	£0
Home owners emergency assistance	£228.00	£228.00
Sundries		
Postage and copying etc.	£60.00	£60.00
Reserves and Cyclical Repairs		

Insurance revaluation accumulation	£342.00	£0.00
General reserve accumulation	£500.00	£500.00
Professional Fees		
Health and safety risk management	£432.00	£432.00
Management fees	£2,998.00	£2,998.00
Accountancy fees	£420.00	£420.00
Total Annual Expenditure:	**£22,592.00**	**£18,130.78**
Difference:		**£4,461.22**

56. The result of all of the foregoing is as follows:

56.1 We reject all three of the Respondent's challenges to the reasonableness of the actual expenditure incurred by the landlord. There is no challenge to the standard of the services provided (with the limited possible exception of the landlord's failure to take meter readings for the electricity) and the expenditure was reasonably incurred in relation to the sums in the table at page 154 and in relation to the three challenges to electrical repairs (£3,168.96), electricity to common parts (£752.78) and management fees (£2998.21) in particular.

56.2 We regard much of the budget, and therefore most of the interim service charge, to have been reasonable for the purposes of section 19(2) of the 1985 Act and having regard to the likely amount of the actual service charge (for the purposes of paragraph 7-2.6 of Schedule 7 of the Lease). However, on the evidence presented to us, we take the view that the budget for the service charge was too high to the extent of £4,461.22 for the reasons already given. This reduces the budget from £22,592 to £18,130.78 or from £1,189.05 to £954.25 for the Respondent meaning that his two advance payments for service charges should have been £477.13 each rather than £594.53.

56.3 In practical terms this means that the balance due on the Respondent's account prior to issue of the claim should have been £234.80 less. Excluding the separately pleaded administration charges and recharged expenditure this reduces the sum of £469.36 (characterised as "Service Charges" for the period 1 January 2013 to 30 June 2013) from £469.36 to £234.56 (there is a separate issue about other administration charges which we explain below). Of course, the ultimate balance on

the account would be the same after the credit for service charge for that year was applied (in September 2013).

57. When the claim was issued on 3 July 2013 the interim service charge for the period from 1 July 2013 to 31 December 2013 had fallen due (in the sum of £346.41). Under paragraph 7-2.8 the Applicant was liable to furnish the Respondent with an account of the Service Charge payable by him for that financial year and to make appropriate adjustments. In our view it could not be said that three days into the next accounting year was a reasonably practical period in which to carry out the adjustment and so a balance of £234.56 (excluding the 1 July 2013 payment of account of service charge and administration charges and recharged expenditure considered below) was properly due. We have considered whether it was reasonable to issue the claim on 3 July 2013 rather than awaiting the outcome of the contractually required accounting adjustments but on balance we consider that that would be an unfair criticism. The scheme of leases such as the present requires that landlords must be able to collect interim service charges otherwise the landlord will be perpetually locked into a cycle of providing only limited services (because of the limitations of income) and giving a credit on the account for services not supplied. That has been a problem which has plagued this estate.

The Administration Charges

58. The Applicant claims for two administration charges of £144.00 and £198.00. Mr. Owens expressly disavowed any challenge to the recoverability of the service charges based on the form of the demands. The issues accordingly were whether they were recoverable under the Lease and, if so, were they reasonable in amount?

59. As already noted above, the issue of the administration charges was not technically transferred to us by the County Court. The fee of £198 was described in an invoice from HLM Property Management Surveyors as a "solicitor referral fee". The £144 was for "raising of LBA fee".

60. In Ms. Lynch's Statement of Case for the Applicant it was asserted that these charges were added under Schedule 5-14 of the Lease which we have already set out above:

61. An administration charge is defined in Schedule 11, para. 1(1) of the Commonhold and Leasehold Reform Act 2002:

"1(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) ...

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease..."

62. A variable administration charge is payable only to the extent that it is reasonable (see paragraph 2 of Schedule 11).

63. As stated above, the Respondent challenges the administration charges on the basis that they are not recoverable under the Lease nor reasonable. Paragraph 5-14 allows recovery of "all costs, fees, charges, disbursements and expenses...incurred by the landlord". In our view, where the landlord or its managing agent are constrained to send out letters relating to outstanding arrears of service charge that is properly characterised as an expense incurred by the landlord and is recoverable in principle.

64. The material charges fall within the definition of administration charges under the 2002 Act at paragraph 1(1)(c) or (d) of Schedule 11. The Applicant's evidence, in Ms. Lynch's statement at paragraph 10, is that the administration charges are reasonable taking into account the administrative, staff, postage and other costs incurred in chasing late payment. Mr. Ryan's evidence was that this work is carried out by HLM and is not outsourced. An initial letter to defaulters would be sent automatically but Mr. Ryan's evidence was that the debt collection was not an automated system and was managed by an employed credit

controller. A fee was not raised for every letter but only for the final letter before referral to solicitors and for the cost of the referral if that did not result in clearance of the arrears.

65. At the time when the material charges were raised the interim service charge was outstanding. In the circumstances, it was not unreasonable for fees to be incurred in connection with that account if the administration charge amounts are genuine and reasonable. We determine that the administration charges are recoverable to the extent that they represent genuine expenses of the landlord.

66. Although there are earlier letters and expenses in relation to the arrears, the initial fee can only relate to the letter before action because it is only if that is sent that the fee is charged to the account. Whilst the process may not be wholly automated, ascertaining the level of arrears is (or should be) straightforward and the letter will be a standard letter. We have considered the work that might be involved in preparing and sending such a letter having regard to the fact that this will be undertaken by an experienced managing agent with an experienced credit controller. We regard a reasonable fee for such work to be £30 generally but allowing for the complexities and history of this site some limited additional work may reasonably have been involved and we regard £40 plus VAT to be appropriate for this account on this estate in those circumstances.

67. In relation to the solicitor's referral fee, we note that HLM have an arrangement with "QualitySolicitors" Lockings. The Respondent made the point that when the claim form was issued out of the County Court in Northampton it was a three paragraph Particulars of Claim and gave no particulars at all in relation to the Lease. It was submitted that it looked like, and probably was, a standard *pro forma* Particulars of Claim. Indeed, it appears to us that the claim could well have been drafted exclusively by reference to the one page "debtor history". The Applicant did not provide a detailed account of the documentation sent to Lockings but it seems probable that they are, and were, sent minimal information as part of the referral and that the attendant expense of referral at that point would have been limited to collating very limited information beyond the supply of the debtor history. In those circumstances we regard a referral fee of £100 plus VAT to be reasonable.

68. It follows that in our view the VAT inclusive administration charges sought in the claim form of £144 and £198 were unreasonable. We determine that reasonable sums were £40 plus VAT and £100 plus VAT respectively.

The administration charges contributing to the "service charge" balance of £469.36

69. We noted from the debtor history that an earlier administration charge in December 2011 had been £100 with a succeeding administration charge in March 2012 of £125.

70. If those fees were also invoiced as "*Raising of LBA fee*" it would necessarily follow from the foregoing that we would have reduced both to £40 plus VAT and so £96.00 in total. This would reduce the "service charge" claim by a further £174 from £234.56 to £60.56 on the basis that the "service charge" claim is, in reality, a claim for the balance on the Respondent's account.

71. The difficulty, however, is that neither party has addressed this issue adequately. Because the claim simply seeks the balance of £469.36 as service charges (as it was the service charge claim that tipped the account back into arrears) and only singles out two later sums as administration charges, the Defence does not plead to the recoverability of the earlier administration charges that effectively form part of the running total. Moreover, the Claimant led no evidence about the precise character of those administration charges, no doubt because they were not obviously in issue given the Defence. It follows that it is possible that these administration charges were not identical to that raised in February 2013. Accordingly, we have not considered it appropriate to vary those earlier administration charges.

72. Rather, our conclusion is that the sum £234.56 is recoverable on the basis that the Applicant has effectively issued a claim for the balance of the account by treating the most recent liability as the debt in arrears (i.e. the 1 January 2013 interim service charge) after giving credit for the sums in the account at that time. It follows, however, that our decision does not prejudice the Respondent's entitlement to challenge those administration charges dated 14 December 2011 and 2 March 2012 which formed part of the earlier balance on the account (either in the County Court proceedings or LVT). We would, however, express the hope that our indications given above will allow the parties to agree the material sum.

Legal fees: £1,000 and Recharged Expenditure: £7.20

73. It is settled that, in general, the inclusion of legal costs as a recoverable service charge will not be allowed in the absence of very clear words in the lease. It was common ground between the parties that the legal costs incurred by the landlord were service charges rather than simply administration charges and we indicated that we would proceed accordingly. The Respondent is liable to pay all costs, fees, charges, disbursements and expenses, including those payable to counsel and solicitors in relation to the recovery of arrears of sums due, under the Lease under Paragraph 5-14. Under Paragraph 7-3.14 the Services include: *"employing such persons as the landlord, acting reasonably, considers necessary or desirable from time to time in connection with...collecting rents accruing to the landlord...".*

74. On the basis of the parties' common ground that the legal costs are recoverable as service charges we must consider whether they were reasonably incurred and of a reasonable standard under section 19 of the Landlord and Tenant Act 1985. Even if that common ground or concession was not correct, costs which fall within the definition of administration charges are also payable only to the extent that they are reasonable in amount under the provisions of the 2002 Act.

75. There was no detailed evidence on this. The claim is pleaded in the County Court proceedings in the following terms:

"Pursuant to the terms of the lease the Claimant is entitled to claim from the Defendant the Claimant's legal costs in addition to the fixed costs allowable by the Court of £80.00. On entering judgment in default of a Defence or on the basis of the Defendant's admission in full and proposal to pay immediately these additional costs amount to £1,000 broken down as follows:

£900 costs plus Vat of £180.00 less £80.00 fixed costs

The Claimant's costs will be charged on an hourly rate of £200 per hour in addition to the above should the Defendant defend this matter or admit in full but fail to make a proposal to pay immediately in full."

76. It follows that what is being claimed, prospectively, is four and a half hours at an hourly rate of £200. This presents something of a difficulty because the claim is including costs that had (at least in part) not been incurred as at the date of issue. Moreover, the claim did not unfold as anticipated because a Defence was filed and thereafter there was a Reply and

referral to this Tribunal. Any determination on this issue therefore has an air of unreality about it since we were not presented with a summary schedule of costs updating the Tribunal as to the amount of the costs actually incurred and claimed under the terms of the Lease.

77. In the circumstances the question of the reasonableness of the legal costs cannot be finally determined. In order to assist the parties, however, we would express the following views.

78. Assuming that those costs have indeed been incurred are they reasonable? We heard no helpful evidence from any solicitor involved nor could Mr. Ryan shed light on precisely what is said to be involved in that four and a half hours. Self-evidently that will involve completing the claim form after considering the file referred to Lockings by the managing agents and taking the relevant steps to issue the claim including obtaining disbursements on account to cover court fees.

79. The White Book 2014 retains guideline rates for summary assessment (at page 1777) albeit, that these are somewhat out of date with the most recent update coming in 2010. Lockings are based in Hull which is a band two area. The guideline rates are grade A: £201, Grade B: £177, Grade C: £146 and Grade D: £111. For these purposes a Grade A fee earner has over eight years' post qualification experience including eight years' litigation experience. Grade B means solicitors and legal executives with over four years' post qualification experience. Grade C means other solicitors and legal executives and fee earners of equivalent experience whilst Grade D means trainees.

80. Claims of this type should be well within the expertise of a Grade B fee earner at most but after allowance has been made to update 2010 rates we determine that the hourly rate of £200 is reasonable. However, given the simplicity of the claim form we consider that the Applicant's reasonable costs up to the filing of a Defence should be limited to three hours and so £600.

81. The fee of £7.20 as "recharged expenditure" is the fee charged by the Land Registry for the provision of Office Copy Entries for the leaseholder. In our view that is a reasonable expense to incur prior to the issue of a claim in relation to leasehold property.

The Decision in Summary

82. In view of the foregoing we determine as follows:

82.1 The pleaded claim for "service charges" from 1 January 2013 to 30 June 2013 in the sum of £469.36 is in fact for the balance due on the Respondent's account on or around 18 April 2013. The liability that tipped the account ostensibly into arrears of 469.36 was the 1 January 2013 service charge liability of £594.53.

82.2 The interim service charge for that pleaded period (1 January 2013 to 30 June 2013) of £594.53 was based on an annual budget for the period from 1 July 2012 to 30 June 2013 of £22,592.00 for the Estate and £1,189.05 for the Respondent's apartment. We determine that a reasonable budget was £18,130.78. The interim service charge for the full financial year should be £954.25 and the claim for the "service charge" balance is therefore reduced from £469.36 to £234.56.

82.3 Our determination that the sum £234.56 is recoverable is without prejudice to the Respondent's entitlement to challenge administration charges dated 14 December 2011 and 2 March 2012.

82.4 As the Respondent received a credit for £768.47 against the overpaid interim service charge on 5 September 2013 the reduction in the interim service charge would not affect the balance outstanding on the Respondent's account unless the actual expenditure on the Services was unreasonable. We determine that the actual expenditure was reasonable and reject all three of the Respondent's challenges to actual expenditure.

82.5 The amount of the pleaded administration charges was of £144.00 and £198.00 was unreasonable. We determine that reasonable administration charges for those expenses were £40 and £100 plus VAT and so £168 in total.

82.6 We determine that a claim of four and a half hours to issue a basic claim at grade B fee earner rates is unreasonable. A reasonable cost for such work is three hours at £200 and so £600 plus VAT would be appropriate, if incurred, for the work up to receipt of the Defence. This would reduce the claimed legal costs from £1,000 to £640.

Section 20C

83. Under section 20C of the 1985 Act it is provided that:

"20C (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
(2)The application shall be made—
(a)in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa)in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b)in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(c)in the case of proceedings before the Upper Tribunal, to the tribunal;
(d)in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
(3)The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

84. As the parties are agreed that the costs are service charges it is common ground that the section 20C jurisdiction applies here and we accordingly heard no argument on what, if any, scope there would be to consider a section 20C application if the costs were administration charges only.

85. In *Iperion Investments Corporation v Broadwalk House Residents Limited* [1995] 2 EGLR 47 (CA) Peter Gibson LJ referred to section 19 of the 1985 Act (which he said "prevents a landlord from recovering so much of a service charge as consists of costs unreasonably incurred") and section 20C ("which goes further") and then said at 49F:

"Thus it is apparent that the court has a discretion to direct that litigation costs be excluded from a service charge, even if the costs have passed the test of section 19 and have been reasonably incurred. The obvious circumstances which Parliament must be taken to have had in mind in enacting section 20C is a case where the tenant has been successful in litigation against the landlord and yet the costs of the proceedings are within the service charge recoverable from the tenant."

86. And at 49H:

"To my mind, it is unattractive that a tenant who has been substantially successful in litigation against his landlord and who has been told by the court that not merely need he pay no part of the landlord's costs, but has had an award of costs in his favour should find himself having to pay any part of the landlord's costs through the service charge. In general, in my judgment, the landlord should not 'get through the back door what has been

refused by the front': Holding & Management Ltd v Property Holding & Investment Trust plc [1989] 1 WLR 1313 at p1324 per Nicholls LJ."

87. In *Tenants of Langford Court v. Doren Ltd.* (LRX/37/2000, Lands Tribunal unreported 2001) HHJ Rich provided the following guidance:

"[28] In my judgment the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise."

88. He then added:

"[30] Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

[31] In my judgment the primary consideration that the LVT should keep in mind is that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that makes its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of section 19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which has heard the litigation giving rise to the costs can avoid arguments under s. 19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even though costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them".

89. In Veena SA v. Cheong [2003] 1 EGLR 175 at [121] the foregoing was held to invite an approach considering (i) the outcome of the LVT proceedings, (ii) the conduct of the parties and other circumstances and (3) having regard to those matters, what order was just and equitable in the circumstances.

90. In *Schilling v. Canary Riverside* (LRX/26/2005 Lands Tribunal unreported) HHJ Rich reaffirmed the principles in *Doren* but noted that in many service charge cases the outcome cannot be measured merely by whether the applicant has succeeded in obtaining a reduction or not.

"13. …The ratio of the [Doren] Decision is "there is no automatic expectation of an Order under s20C in favour of a successful tenant." So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s20C in his favour.

"14. …the outcome is to be given weight in considering whether to make an Order and may affect whether the right of recovery should be limited to part only of the costs incurred by the landlord… "the outcome of the proceedings" [is] one of "the circumstances" to which sub-section (3) requires the consideration of what is just and equitable to have regard. This was said in the context of an application for the appointment of a manager, which meant that the tenants had undoubtedly been successful, in service charge cases, the "outcome" cannot be measured merely by whether the applicant has succeeded in obtaining a reduction. That would be to make an Order "follow the event". Weight should be given rather to the degree of success, that is the proportionality between the complaints and the Determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of service charges on the one hand and the costs of the dispute on the other hand".

91. More recently in two decisions of HHJ Gerald the following guidance has been provided. In <u>*Church Commissioners v. Derdabi*</u> [2010] UKUT 380 (LC) the following was stated:

*"18. In very broad terms, the usual starting point will be to identify and consider what matter or matters are in issue, whether the tenant has succeeded on all or some only of them, whether the tenant has been successful in whole or in part (*i.e. *was the amount claimed in respect of each issue reduced by the whole amount sought by the tenant or only part of it), whether the whole or only part of the landlord's costs should be recoverable via the service charge, if only part what the appropriate percentage should be and finally whether there are any other factors or circumstances which should be taken into account.*

19. Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs via the service charge. By parity of reasoning, the landlord should not be prevented from recovering via the service charge his costs of dealing with the unsuccessful parts of the tenant's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights.

20. However, whether and if so to what extent such an order should be made may depend on many factors. In some cases, "proportionality" will be material. If the reduction is but a fraction of that sought by the tenant, it may follow that the landlord should only be prevented from recovering the costs of dealing with that fraction. If the tenant succeeds on only one of three issues, it may be that the landlord should only be prevented from recovering his costs of dealing with the successful issues. Sometimes these points will make no difference because it has not cost the landlord any more to deal with the unsuccessful elements of the tenant's claim.

21. In other cases, "conduct" will be relevant: even though the tenant has succeeded and perhaps substantially, has he unnecessarily raised issues with which the landlord has had to deal such that the landlord should not be prevented from recovering any associated costs via the service charge. There will also be cases where "circumstances" may be relevant

– such as the landlord being a resident-owned management company with no resources apart from the service charge income.

22. Where the landlord is to be prevented from recovering part only of his costs via the service charge, it should be expressed as a percentage of the costs recoverable. The tenant will still of course be able to challenge the reasonableness of the amount of the costs recoverable, but provided the amount is expressed as a percentage it should avoid the need for a detailed assessment or analysis of the costs associated with any particular issue.

23. In determining the percentage, it is not intended that the tribunal conduct some sort of "mini taxation" exercise. Rather, a robust, broad-brush approach should be adopted based upon the material before the tribunal and taking into account all relevant factors and circumstances including the complexity of the matters in issue and the evidence presented and relied on in respect of them, the time occupied by the tribunal and any other pertinent matters. It will be a rare case where the appropriate percentage is not clear. It is the tribunal seized with resolving the substantive issues which is best placed to determine all of these matters."

92. In *St John's Wood Leases Limited v. O'Neil* [2012] UKUT 374 (LC) the following additional guidance was given:

16. In our judgement, those comments of His Honour Judge Rich QC [quoted above] should not be understood as laying down any sort of principle or rule that no section 20C order should be made where the tenant has succeeded only in showing that the service charge or some part or parts of it are unreasonable (whether by reason of being incurred or their amount) unless there is a finding of something more than that of mere unreasonableness. As was made clear in both Doren and Schilling whether such an order should be made depends on the facts and circumstances of the case and ultimately what is just and equitable in those circumstances.

17. The only guidance as to the exercise of the section 20C discretion is to apply the statutory test of what is just and equitable in the circumstances. Derdabi was merely intended to give some practical guidance as to how to approach the exercise of the discretion, not to suggest how the discretion should ultimately be exercised not least because every case is fact-specific and there is an infinite variety of factors and circumstances which occur in cases before the LVT. Whilst a simple arithmetical calculation of success may well not give the "correct" answer as to how the section 20C discretion should be exercised, it frequently will although, naturally, the reasons why and the amount by which any service charge expenditure have been disallowed will always be important.

18. By way of illustration only, if items of service charge expenditure were disallowed because the landlord was unable to substantiate the charges by adducing evidence that they had been incurred or paid, it would usually follow that the expenditure should not have been charged in the first place or at any rate pursued, so that it would usually be unjust and inequitable for the landlord to recover his costs of pursuing or defending the claim. If they were disallowed or greatly reduced, not due to an absence of evidence that they had been incurred but because the landlord's evidence as to the reasonableness of the amount charged was most unsatisfactory, it may also be difficult to resist a section 20C application. If the gap between the position of the landlord and tenant is relatively small but the tenant's evidence

is on balance preferred resulting in a small reduction, it may well be less likely that a section 20C order would be made."

93. Before turning to the application of those principles in the instant case it is also necessary here to consider Ms. Meager's submission was that the Respondent's application was made late and without written representations. Whilst there is force in those submissions, in reality it is difficult for any party to make section 20C submissions before knowing the substantive outcome and there was no suggestion that the Applicant had suffered any prejudice. Indeed, the fact that a section 20C application was being made has been obvious since 18 February 2014. In view of that lack of prejudice and the reality of section 20C applications we do therefore entertain the application.

94. Applying the principles summarised above, we regard the following as relevant.

(I) The principal issue in this case was the claim for "service charges" for 1 January 2013 to 30 June 2013 and that claim was defended on the basis that the interim service charge was set unreasonably high such that it was denied that the Respondent was indebted to the Applicant. Although we have determined that a reasonable interim service charge was £954.25 rather than £1,189.05 the budget generally was the product of lengthy and reasonable attempts by the landlord and was reasonable in most respects. The budget has been reduced by 20 percent but, on balance, in our view the Applicant was substantially successful in relation to that issue. In particular we note that paragraph 7 of the Defence was effectively contending that the interim service charge should have been reduced by 50 percent.

(II) It is material, however, that the budget upon which the interim service charge was based did not form part of the Applicant's papers until it was inserted into the bundle at page 290A during day one of this hearing and that central to our determination of the reasonableness of the service charges have been a version of that document at page 368 and the Issues Register at 369. In relation to conduct, it is also the case that the Applicant's evidence in relation to the receipts of service charges on the estate was not satisfactory despite the application to adjourn that had been made on day one to address that very issue. That was, of course, material to the explanation for the apparent over-budgeting of expenditure.

(III) Conversely, none of the Respondent's challenges to the actual expenditure were sustainable. This is material because, of course, the interim service charge dispute is

on one view academic given the credits on the account. Subject to the question of costs and administration charges, no practical change would result in the balance of the Respondent's account unless he succeeded on these (otherwise unpleaded) challenges but he has not.

(IV) The pleaded claims for administration charges and legal costs were successful in relation to their recoverability under the Lease but they have been materially reduced in amount.

95. Because both parties were insistent that the dispute over the interim service charge was not academic, we do not factor into our consideration the extent to which costs have been incurred in dealing with an issue that was arguably overtaken by the credits to the Respondent's account in September 2013.

96. It follows that whilst the Applicant has been largely successful it will have incurred costs in dealing with those issues upon which the Respondent has succeeded in part. In particular the budget for the gate works and electricity was unreasonable and the administration charges and costs were too high. We must determine what order is "just and equitable in the circumstances". Having regard to the factors enumerated above we consider that 20 percent of the costs incurred by the landlord in connection with the proceedings should not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. This reflects the degree of success by the Respondent and the costs associated with the evidential issues that prompted the application for an adjournment.

DATED this 2nd day of September 2014

DETERMINATION

1. The claim for £469.36 for outstanding service charges should be allowed in the sum of £234.56 but without prejudice to the Respondent's entitlement to challenge administration charges dated 14 December 2011 and 2 March 2012.
2. The claim for administration charges of £144.00 and £198.00 should be allowed in the sum of £168 in total.
3. The claim for recharged expenditure of £7.20 should be allowed in full.

4. The claim for £1,000 for costs should be allowed in the reduced sum of £640, if incurred, for the work up to, and including, receipt of the Defence.
5. Save as above, we have not considered and so make no determination as to the reasonableness of the legal costs incurred for the purposes of section 19 of the 1985 Act.
6. Pursuant to Under section 20C of the 1985 Act, 20 percent of the costs incurred by the Claimant in connection with the proceedings should not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

Dated this 2nd Day of September 2014

CHAIRMAN